No. 89-826

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF GLENDALE,
a California corporation,

Petitioner,

vs.

COUNTY OF LOS ANGELES, CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION SEVEN

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case is back in this Court after this Court's remand to the California Court of Appeal. (*First English Evangelical Lutheran Church v. County of Los Angeles* [1987] 482 US 304) Because the California Court of Appeal responded to this Court's remand by dismissing the case as a matter of law — instead of returning it to the superior court for trial to determine whether a Fifth Amendment taking had in fact occurred — the following questions now need decision by this Court:

1. Did the California Court of Appeal violate this Court's remand order in this case when it refused to have a trial court determine what the facts are and whether those facts are a Fifth Amendment taking?

2. Did the California Court of Appeal deny Petitioner due process of law when, instead of ordering a trial to determine the facts in this case, the Court of Appeal took selective judicial notice (over Petitioner's objections) of a few documents from the County's planning files and used the judicially noticed materials to "prove" the facts needed to support dismissal, thereby — for a second time — dismissing this case on its pleadings without fact finding?

3. Can a land use regulation adopted for a proper purpose violate the Fifth Amendment's Just Compensation Clause if it takes private property for public use without compensation?

4. Does a land use regulation violate this Court's standard for a taking (*i.e.*, deprivation of "economically viable use") when the regulation prohibits construction of buildings but the Court of Appeal concludes that economic uses are available to the property owner because: "[m]eals could be cooked, games played, lessons given, tents pitched" (App A, p 18)?

Can it be determined that a regulation permits "economically viable use" without a trial and evidence?

5. Does a land use regulation violate this Court's alternative standard for a taking (*i.e.*, interference with "reasonable, investment-backed expectations") when the regulation prohibits any attempt to redevelop the property for its historic retreat and conference center use after its destruction in an unusually large storm?

Can it be determined whether a regulation interferes with "reasonable, investment-backed expectations" without a trial and evidence?

6. Did the California Court of Appeal's abject acceptance of the County's rationalizations for its regulation at face value, rather than subjecting them to a more stringent standard of review because they take significant property interests from Petitioner violate the standards established by this Court in *Nollan v. California Coastal Commn.* (1987) 483 US 825?

7. In light of this Court's holding in *Nollan* that property owners have a *right* to build on their property, subject only to reasonable regulation, did the California Court of Appeal violate this Court's standards when it upheld the County's ordinance because it "only" prohibits construction or reconstruction of buildings? (App A, p 18)

PARTIES TO THE PROCEEDING

All parties to this Petition are listed in the caption.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner (First Church) respectfully prays that a Writ of Certiorari issue to review a judgment of the California Court of Appeal, Second Appellate District, Division Seven.

OPINIONS BELOW

The decision of the Court of Appeal (App A) is reported at 210 Cal App 3d 1353. The order modifying the opinion and denying rehearing (App B) was not separately published.

Chief Justice Lucas and Justices Panelli and Kaufman voted to grant review, but the California Supreme Court denied review. The order of the California Supreme Court denying review (App C) was not published.

The proceedings in the California courts before this Court's 1987 decision in this case appear in this Court's file in case no. 85-1199.

JURISDICTION

In this Court's 1987 decision in this case (described by commentators on both sides of the issue as a landmark and blockbuster,[1] the centerpiece of this Court's recent takings

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[1] *Commentary* (1987) 39 Land Use Law & Zoning Digest, no 8 at 3; Bauman, *A True Landmark Decision* (1987) 39 Land Use Law & Zoning Digest, no 8 at 3; Bauman, *The Supreme Court Becomes Serious About Takings Law: The First Church, Keystone and Irving Cases* (1987) 10 Zoning & Planning L. Rep. 145, 146; Falik & Shimko, *The Takings Nexus: The Supreme Court Chooses a New Direction in Land-Use Planning: A View From California* (1988) 39 Hast. L.J. 359; Freilich, Francis & Popejoy, *State and Local Government at the Crossroads: A Bitterly Divided Supreme Court*

(continued)

decisions,[2] and the most significant land use decision in the last 50 years[3]), this Court struck down, as contrary to the Fifth Amendment, California's rule (from *Agins v. City of Tiburon* [1979] 24 C 3d 266) that the only remedy for one whose property is taken by a government regulation is invalidation of the regulation.

In the case at bench (before this Court's 1987 decision), the trial court struck the regulatory taking allegations from the complaint because of the *Agins* rule. Thus, after this Court annulled the *Agins* rule and established the Constitutionally required remedy as compensation, this Court remanded this case to the California courts to determine whether the *facts* showed a taking which required compensation.

Two years later, the Court of Appeal concluded — *without* trial, and thus *without* any factual record (the record is only the complaint and a motion to strike allegations from it) — that the *facts* do not show a taking. Thus — for a second time — the Court of Appeal denied First Church a trial on its taking claim.

This Court's 1987 decisions in this case and in *Nollan v. California Coastal Commn.* (1987) 483 US 825 seemed intended to inform the California courts that they had not

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(ftn. continued)
Reevaluates Federalism in the Bicentennial Year of the Constitution (1987) 19 The Urban Lawyer 791, 794; Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches* (1988) 39 Hast. L.J. 335, 344; Pollot, *The Effect of the Federal Takings Executive Order* (1989) 41 Land Use Law & Zoning Digest, no 5 at 3; Strong, *On Placing Property Due Process Center Stage in Takings Jurisprudence* (1988) 49 Ohio St. L.J. 591, 598; Note (1988) 10 Campbell L. Rev. 275.

[2] Siemon & Larsen, *The Taking Issue Trilogy: The Beginning of the End?* (1988) 33 J. Urb. & Contemp. L. 169, 170, 181.

[3] Falik & Shimko, 39 Hast L.J. at 1; *see* Note, 10 Campbell L. Rev. at 292.

provided the protections given property owners by the Fifth Amendment. The result below shows that the California courts do not yet appear to have received this Court's message. Instead, the California courts continue on their own course, gambling that this Court will not have the time to correct their wilfull defiance.

Because of:

- the importance of the legal issues in the remand from this Court's 1987 decision,
- the Court of Appeal's erroneous denial of trial and application of legal precepts which conflict with clear holdings of this Court in this and other cases,
- the Court of Appeal's erroneous determination of fact issues without any factual record, and
- the subversion of this Court's decision in this case,

First Church prays that Certiorari be granted and the judgment as to the regulatory taking cause of action be reversed for trial to determine whether the facts in this case require enforcement of the legal remedy established by this Court in this case.

The Court of Appeal's decision on remand from this Court was filed May 26, 1989 (App A) and modified June 23, 1989 when rehearing was denied (App B). Three California Supreme Court Justices, Chief Justice Lucas and Justices Panelli and Kaufman, voted to grant review, but the timely Petition for Review was denied by the California Supreme Court August 25, 1989. (App C)

This Court's jurisdiction is invoked pursuant to 28 USC §1257(a).

CONSTITUTIONAL AND REGULATORY PROVISIONS

Fifth Amendment, United States Constitution:

> ". . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

> "Section 1 . . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . ."

Pertinent Los Angeles County ordinances are in App D.

STATEMENT OF THE CASE

This case involves what used to be a conference center, called Lutherglen, maintained for two decades by First Church on 21 acres it owns in the mountains north of the City of Los Angeles. The conference center was a place for meetings, retreats, recreation, and camping.

In 1978, extraordinary storm runoff during an unusually severe storm (and after fire denuded the watershed, eliminating its water retention capability) caused a creek which runs through the property to overflow, destroying all the camp's buildings.

Immediately after the storm, the County adopted Ordinance no. 11855, temporarily prohibiting any construction in the area. Two and a half years later, the temporary prohibition was made permanent. (App D contains both ordinances.)

First Church sued the County and the County Flood Control District a month after the adoption of the temporary ordinance. The only cause of action at issue on this Petition is First Church's claim that the prohibition of any construction is a taking of all economically viable use of the property

within the meaning of the Fifth Amendment's Just Compensation Clause, as applied through the Fourteenth Amendment. (See 482 US at 313, fn 8.)

The effect of the ordinance is to convert Lutherglen into part of the channel which collects mountain runoff and transports the water to a downstream reservoir for storage.

Before this Court's 1987 decision in this case, the trial court granted the County's motion to strike all allegations about the ordinance on the ground that the California Supreme Court's decision in *Agins* forbade *any* action for compensation for a regulatory taking of property.[4]

The Court of Appeal affirmed, the California Supreme Court denied review, and this Court took jurisdiction of the appeal and remanded, holding that *Agins* violated the Fifth Amendment because the Fifth Amendment requires compensation for all governmental takings. The case was remanded so the California courts could determine whether the *facts* of this case entitle First Church to the remedy held available by this Court in this case.

Instead of remanding for trial to determine what the facts actually are, the Court of Appeal concluded that the facts (present in the record only in the form of a complaint and a motion to strike) could not state a cause of action. (App A)[5]

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[4] When the temporary ordinance was replaced by a permanent ordinance two and a half years later, First Church did not amend its complaint to so allege because *Agins* would have made it a futile gesture. As the trial court had already held, no action seeking compensation for a regulatory taking could then have been pled. After this Court's decision in this case compelled recognition of the cause of action for the first time, First Church told the Court of Appeal that it planned to ask leave on remand to the trial court (where pleadings can be amended) to amend its complaint to so allege, as *Agins* is no longer a bar.

[5] Over First Church's repeated objections, both before and after filing its decision (see Pet for Rehearing 7), the Court of Appeal took selective judicial notice of documents from the County's files.

(continued)

First Church's timely Petition for Rehearing was denied (App B), as was its Petition for Review in the California Supreme Court (App C), although Chief Justice Lucas and Justices Panelli and Kaufman voted to grant review.

RAISING THE FEDERAL QUESTIONS

When this case was before the trial court (before this Court's 1987 decision in this case), *no* substantive taking issues under the Fifth Amendment were argued, although the issues were pled in the complaint. On its first trip through the California court system, the *only* issue briefed and argued at any level was the *remedy* question of whether the Fifth Amendment required compensation for a regulatory taking.

After this Court decided the remedy issue in First Church's favor in 1987, the substantive taking issues were then ready for trial.

The substantive issues raised in this Petition were raised and argued in supplemental briefs ordered by the Court of Appeal after this Court's remand. The Court of Appeal's constitutionally erroneous resolution of those issues was raised in the Petition for Rehearing in the Court of Appeal and in the Petition for Review in the California Supreme Court.

The federal questions are properly before this Court.

(ftn. continued)
(App A, pp 19-22) That selective judicial notice — of only documents which supported the County but not documents requested by First Church which would have made clear the factual conflict and need for a trial — instead of remanding for trial court evaluation of *all* the facts, deprived First Church of the ability to have a full and fair trial and a decision based on evidence, in violation of First Church's due process rights under the Fourteenth Amendment to the U.S. Constitution.

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEAL DEFIED THIS COURT'S INSTRUCTION TO PERMIT A FACTUAL DETERMINATION OF WHETHER A TAKING HAD OCCURRED. PURSUING ITS WILFULL AND IDIOSYNCRATIC COURSE, THE CALIFORNIA COURT OF APPEAL PERMITTED THE COUNTY TO "PROVE" ITS CASE BY JUDICIAL NOTICE AT THE APPELLATE LEVEL, THEREBY DENYING FIRST CHURCH DUE PROCESS OF LAW

The Court of Appeal's decision violates the plain intent of this Court's 1987 decision in this case that there be a factual, evidentiary inquiry to determine whether the County's actions violated the Fifth Amendment's Just Compensation Clause.

Based on the *same* facts which were before the Court of Appeal, this Court said:

> ". . . we . . . hold that *on these facts* the California courts have decided the compensation question inconsistently with the requirements of the Fifth Amendment." (482 US at 310-311; emphasis added.)

Based on *no additional facts*, the Court of Appeal dismissed the case without trial. When this Court issued its opinion based ". . . on these facts . . ." it envisioned a trial to determine what lay behind ". . . these facts . . ." as alleged in the complaint.

Fact determination is the province of trial — not appellate — courts.

However, instead of remanding for trial, the Court of Appeal decided *four fact issues* without *any* evidentiary

record — a result which will certainly confound experts on *both* sides who thought that the next step in this case would be a trial to determine the facts.[6] With no trial court evaluation of evidence, the Court of Appeal purported to find as fact that:

- the ordinance *substantially advances* a legitimate governmental purpose;
- the ordinance *does not take the use* of First Church's property;
- the moratorium was enacted for a *reasonable* purpose; and
- the 2 1/2 year moratorium was in effect for a *reasonable* period of time.

None of those issues is capable of determination without evidence. *All* of them require fact examination.[7] One can-

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[6] *E.g.*, Bauman, 10 Zoning & Planning Law Report at 149, 150; Bozung & Alessi, *Recent Developments in Environmental Preservation and the Rights of Property Owners* (1988) 20 The Urban Lawyer 969, 1015; Curtin & Durkee, *Money for the Taking: When Land Use Regulation Goes Too Far* (1988) 1 Hofstra Real Prop. L.J. 109, 122; Doheny & Edmondson, *Supreme Court Land Use Rulings: Responsible Controls Are Not Endangered* (1988) 1 Hofstra Real Prop. L.J. 95, 96; Freilich, Francis & Popejoy, 19 The Urban Lawyer at 801; Ginsburg, *Introduction* to *A Practitioner's Symposium on the Recent Supreme Court Takings Cases* (1988) 1 Hofstra Prop. L.J. 69, 70; Marsh & Rosenthal, *At Long Last, The Supreme Court Speaks Out on the "Taking" Issue* (No. 2 1987) 5 Cal. Real Prop. L.J. 1, 2; Merriam, *Commentary on First English and Nollan* (1988) 1 Hofstra Real Prop. L.J. 83, 84, 85; Peterson, 39 Hast. L.J. at 337; Schnidman, *The United States Supreme Court Finally Addresses the Regulatory Taking Issue* (1987) 14 Fla. Env. & Urban Issues, no 4 at 2, 3; Comment (1988) 28 Nat. Res. J. 585, 603; Note (1988) 48 La. L. Rev. 947.

[7] The Court of Appeal's opinion abounds with other fact issues on which the Court of Appeal assumed the outcome: the presence of "substantial" structures on the property poses a threat to public

(continued)

not determine whether the prohibition of this ordinance is necessary to substantially advance a legitimate County interest without evidence of the need or available alternatives if there is a need. Nor can the extent of denial of use be determined without evidence of the remaining uses and their value. Likewise, determining the reasonableness of both the purpose and length of a moratorium requires weighing evidence as to why 2 1/2 years are needed to decide what problem is presented and what methods of cure are available.

Appellate courts lack the experience, jurisdiction, and facilities to find facts. Without a record, no one can properly do so.[8]

(ftn. continued)
health and safety (App A, p 12); the public safety concerns at bench are "far more dominant" than those in *Keystone* (App A, p 14 fn 9); all use can be prevented *if* any use poses a threat to life and health (App A, p 17); use can be denied *if* property cannot be used without risking injury and death (App A, p 17); the subject property still has buildable areas (App A, p 21); the restriction in this case is "nowhere near as Draconian" as the destruction of trees in *Miller v. Schoene* (1928) 276 US 672 (App A, p 23); remaining "uses" are listed, without any evaluation of the economic viability of those uses (App A, p 23); First Church will benefit because neighbors will be prevented from building on the neighbors' land (App A, pp 24-25).

[8] Thus, for example, when the Court of Appeal concluded, that "... here, the public safety concerns are *far more dominant* than they are even in *Keystone Bituminous Coal*" (App A, p 14, fn 9; emphasis added), there was no basis for saying that. In *Keystone*, the statute was designed to prevent substantial damage to many homes, public buildings, public water supplies, public roads, pipelines, sewage lines, gas lines and water lines, all of which could be devastated by excessive underground coal extraction. (480 US at 475, 485-486) The Court of Appeal had no evidence at bench from which to make its contrast.

Nor is there evidence from which the Court of Appeal could properly conclude that the radical use prohibition at bench is "... nowhere near as Draconian ..." as the requirement that ornamental trees be cut down in *Miller* because of disease threatening others. (App A, p 23)

When the Court of Appeal says "[w]e cannot say that without a thorough-going study it would have been reasonably feasible to identify *any* structure which could be safely permitted . . ." (App A, p 27), the *reason* why the Court of Appeal "cannot say" is that there is no evidence.

Indeed, a commentary which did the same thing as the Court of Appeal (*i.e.*, it compared the allegations in the complaint to this Court's takings standards) reached the opposite conclusion from the Court of Appeal. That analysis demonstrated that a taking which required compensation was present at bench. (Comment, 28 Nat. Res. J. 395, 410-414) While this does not prove First Church's case, it casts doubt on the Court of Appeal's absolutist conclusions by showing that an opposite conclusion is equally plausible. That shows the need for trial.

Moreover, the Court of Appeal — over First Church's repeated objections — granted the County's request to take judicial notice of one-sidedly selected snippets of the County's files in order to permit the County to "prove" the need for this ordinance and the asserted lack of harm to First Church from its enactment.

Such appellate judicial notice *of facts which were NOT judicially noticed by the trial court* has been repeatedly condemned by this Court as a violation of due process of law. (*E.g.*, *Ohio Bell Telephone Co. v. Pub. Util. Commn.* [1937] 301 US 292; *Garner v. Louisiana* [1961] 368 US 157.)

In *Garner*, this Court condemned the very practice used by the Court of Appeal in this case, *i.e.*, permitting one party to "prove" its case by judicial notice in the reviewing court without allowing a trial court the opportunity to review the evidence or even to consider the "evidence" proferred for judicial notice:

> "There is nothing in the records to indicate that the trial judge did in fact take judicial notice of anything. To extend the doctrine of judicial notice to the length pressed by the respondent would require us to allow the prosecution to do through argument to this Court what it is required by due process to do at the trial, and would be 'to turn the doctrine into a pretext for dispensing with a trial.' [Citation.]" (368 US at 173)

In *Ohio Bell*, this Court described the proper function of judicial notice:

> ". . . notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence." (301 US at 301)

To go further, and use the judicially noticed material to *prove* the facts, as was done in the case at bench, is a denial of due process. (*Ohio Bell*, 301 US at 300, 302) The type of judicial notice employed at bench permits the decision maker to "wander afield" and make decisions "without reference to any evidence, upon proofs drawn from the clouds." (*Ohio Bell*, 301 US at 307)

The Court of Claims put it aptly:

> "Assuming *arguendo* that it would be proper to take judicial notice of these documents, the Government's *effort to inject them at this [appellate] stage comes too late.* Judicial notice is merely a way of introducing evidence without resort to the ordinary formalities; it does not circumvent the requirements of orderly judicial procedure [citations], and one of those requirements is that appellate tribunals should ordinarily consider only what has been properly presented to the trier of fact below. [Citations.]" (*Turtle Mountain Band of Chippewa Indians v. U.S.* [Ct Cl 1974] 490 F 2d 935, 945; emphasis added.)

The tactic employed by the California Court of Appeal denied First Church its due process right to trial of the facts.

2. THE COURT OF APPEAL IGNORED THIS COURT'S INSTRUCTION IN THIS CASE THAT THE FIFTH AMENDMENT "... IS DESIGNED NOT TO LIMIT THE GOVERNMENTAL INTERFERENCE WITH PROPERTY RIGHTS PER SE, BUT RATHER TO SECURE COMPENSATION IN THE EVENT OF OTHERWISE PROPER INTERFERENCE AMOUNTING TO A TAKING."

A
This Court's Guidance for Remand

Perhaps because, as the Court of Appeal acknowledged, "... the law is not well-settled in this area ..." (App A, p 10), this Court sought to provide guidance for its remand by reviewing and summarizing some bedrock precepts:

> "Consideration of the compensation question must begin with direct reference to the language of the Fifth Amendment, which provides in relevant part that 'private property [shall not] be taken for public use, without just compensation.' As its language indicates, and as the Court has frequently noted, this provision does not prohibit the taking of private property, but instead places *a condition on the exercise of that power*. [Citations.] This basic understanding of the Amendment makes clear that it is designed *not to limit* the governmental interference with property rights per se, but rather to secure compensation in the event of *otherwise proper interference* amounting to a taking. Thus, government action that works a taking of property rights *necessarily* implicates the 'constitutional

> obligation to pay just compensation.' [Citation.]" (482 US at 314-315; emphasis added; Court's emphasis deleted.)

But the Court of Appeal acted as though it did not understand.

The theme which permeates the Court of Appeal's opinion is that the County's flood protection program was necessary, and therefore, the program *could not* result in a taking of First Church's property.

That idea cannot be reconciled with this Court's conclusion that the purpose of the Just Compensation Clause of the Fifth Amendment is to require government to compensate for property taken in the course of "otherwise *proper*" interference.

This Court's holding in this case is a continuation of this Court's consistent holdings that a taking occurs *either* if the regulation is invalid *or*, if valid, the regulation denies the property owner economically viable use of his land.[9] As the Court has repeatedly held, the fact that an ordinance properly advances legitimate governmental interests cannot repeal operation of the Just Compensation Clause of the Fifth Amendment. (*E.g.*, *Loretto*, 458 US at 425; *Kaiser Aetna*, 444 US at 174; *U.S. v. Security Indus. Bank* [1982] 459 US 70, 74-75)

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[9] *Kirby Forest Indus., Inc. v. U.S.* (1984) 467 US 1, 14; *Agins v. City of Tiburon* (1980) 447 US 255, 260; *Penn Central Transp. Co. v. City of New York* (1978) 438 US 104, 124; *Kaiser Aetna v. U.S.* (1979) 444 US 164, 174 fn 8; *MacDonald, Sommer & Frates v. County of Yolo* (1986) 477 US 340, 349 ["reasonable beneficial use"]; *Nollan v. California Coastal Commn.* (1987) 483 US 825, 834; *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 US 470, 485; *U.S. v. Riverside Bayview Homes* (1985) 474 US 121; *Williamson County Regional Planning Commn. v. Hamilton Bank* (1985) 473 US 172; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.* (1981) 452 US 264; *Schad v. Borough of Mount Ephraim* (1981) 452 US 61.

The Court of Appeal's belief in the virtue of the County's action not only fails to satisfy the terms of the remand from this Court, it is irrelevant. As a perceptive commentary noted:

> "[R]evitalization of constitutional guarantees is the most fundamental meaning of the case. *First English* stands as a reminder that even ends which benefit society do not justify means forbidden by the Constitution as unfair to individuals. Its reaffirmation of the mutually dependent relationship between liberty and property which lies at the heart of the just compensation clause of the fifth amendment may in the end prove to be its most significant message." (Comment, *He Who Calls the Tune Must Pay the Piper: Compensation for Regulatory Takings of Property After First English Evangelical Lutheran Church v. County of Los Angeles* [1988] 53 Mo. L. Rev. 70, 120)

The Church whose case inspired that "revitalization" is entitled to its protection.

B

"Flood Protection" Does Not Justify an Uncompensated Regulatory Taking

When inquiring whether a governmental regulation invokes the Just Compensation Clause of the Fifth Amendment, the question is not the subject matter of the governmental regulation but the impact on the private property owner. (*See, e.g., Kaiser Aetna*, 444 US at 174; cases collected in *San Diego Gas & Elec. Co. v. City of San Diego* [1981] 450 US 621, 651-53 [Brennan, J, dissenting].)

A recent case from Rhode Island is instructive. In *Annicelli v. Town of South Kingstown* (RI 1983) 463 A 2d 133, the Town had zoned the property owners' land as being in a "High Flood Danger District." Nothing in the opinion of

the Rhode Island Supreme Court disagreed with the Town's factual conclusions of flood danger. Nonetheless, placing the subject property in a high flood danger zoning district — which precluded development — required compensation.

As *Annicelli* thus makes clear, there is nothing about flood control which automatically immunizes flood control ordinances from Constitutional examination. The late Professor Arvo Van Alstyne, a nationally recognized authority on land use and inverse condemnation law, aptly expressed the point:

> "[L]and use regulations may be constitutionally suspect if so narrowly conceived, with respect to permissible uses, as to render the subject property virtually valueless for normal private purposes while permitting a few uses that appear to be calculated to promote broad community benefits of a kind which could also be readily achieved through an exercise of the power of eminent domain. For example, *flood plain developmental restrictions, enacted to facilitate a community flood control and storm drainage program*, have sometimes been held invalid in the absence of carefully drafted provisions designed to permit maximum private utilization of the subject property for purposes not inconsistent with flood control objectives." (Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria* [1970] 44 So. Cal. L. Rev. 1, 24-25; emphasis added.)[10]

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[10] Illustrative flood control cases are *Dooley v. Town of Fairfield* (Conn 1964) 197 A 2d 770; *Morris County Land Imp. Co. v. Township of Parsippany-Troy Hills* (NJ 1963) 193 A 2d 232; *Hager v. Louisville & Jefferson County* (Ky 1953) 261 SW 2d 619; *MacGibbon v. Board of Appeals* (Mass 1964) 200 NE 2d 254; *State v. Johnson* (Me 1970) 265 A 2d 711; *Mattoon v. City of Norman* (Okla 1980) 617 P 2d 1347; *Annicelli*.

(continued)

Flood control ordinances are judged by the same Constitutional standards as other land use regulations.

3. THE COURT OF APPEAL IGNORED THIS COURT'S STANDARDS FOR DETERMINING WHEN A REGULATION VIOLATES THE FIFTH AMENDMENT: *I.E.*, IF IT DEPRIVES THE PROPERTY OWNER OF "ECONOMICALLY VIABLE USE" OR INTERFERES WITH THE PROPERTY OWNER'S "REASONABLE, INVESTMENT-BACKED EXPECTATIONS" FOR USE OF THE PROPERTY

The law of just compensation is so lacking in bright dividing lines (see App A, p 10) that the Justices of this Court have frequently commented that whether the facts of any particular case give rise to a taking must be decided on an ". . . ad hoc factual . . ." basis in each case.[11]

(ftn. continued)
None of these cases are cited by the Court of Appeal, although they were called to that Court's attention in the briefs. Instead, the Court of Appeal makes a generalized citation to Professor Van Alstyne's article (App A, p 23), obviously failing to grasp the professor's conclusion quoted above.

11 *E.g.*, *Ruckelshaus*, 467 US at 1005; *Kaiser Aetna*, 444 US at 175; *Penn Central*, 438 US at 124. The "ad hoc factual" nature of the inquiry by itself militates against deciding the taking issue (as the Court of Appeal did) without any evidentiary inquiry. As expressed in *Hall v. City of Santa Barbara* (9th Cir 1986) 813 F 2d 198, 201-202:

> "This admonition is perhaps nowhere so apt as in cases involving claims of inverse condemnation where the Supreme Court itself has admitted its inability 'to develop any "set formula" ' for determining when compensation should be paid . . . While dismissal of a complaint for inverse condemnation is not always inappropriate, such a *dismissal must be reviewed with*

(continued)

The Court has, however, announced some guidelines. As summarized earlier, the Court has repeatedly held that a taking occurs if the government regulation denies the property owner "economically viable use" of his property (cases cited at p 13, fn 9) or if the regulation substantially interferes with the property owner's "reasonable, investment-backed expectations" for the use of the property.[12]

Although the Court of Appeal mentions the first of these standards (App A, pp 13-14), there is no way — without evidence — that *any* court can determine whether the County's regulation permitted "economically viable" use or not. To say, as the Court of Appeal does, that First Church can light campfires and pitch tents (App A, p 18) does not even approach an analysis of whether that is an "economically viable" use of 21 acres of land.[13]

(ftn. continued)

particular skepticism to assure that the plaintiffs are not denied a *full and fair opportunity* to present their claims." (Emphasis added.)

12 *Penn Central*, 438 US 104; *Andrus v. Allard* (1979) 444 US 51; *Kaiser Aetna*, 444 US 164; *PruneYard Shopping Center v. Robins* (1980) 447 US 74; *Hodel v. Virginia Surface Min. & Recl. Assn.* (1981) 452 US 264; *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 US 419; *Kirby Forest*, 467 US 1; *Ruckelshaus v. Monsanto Co.* (1984) 467 US 986; *U.S. v. Locke* (1985) 471 US 84; *Williamson County*, 473 US 172; *Riverside Bayview*, 474 US 121; *Connolly v. Pension Benefit Guaranty Corp.* (1986) 475 US 211; *MacDonald*, 477 US 340; *Keystone*, 480 US 470, 493 *et seq.*; *Hodel v. Irving* (1987) 481 US 704, 715; *Nollan*, 483 US at 833, fn 2.

13 *Compare Keystone*, for example, a case heavily relied on by the Court of Appeal (App A, pp 14, 17, 24), in which *evidence* had been introduced from which the Court concluded that the need for the statutory property restriction was great and the impact on the property owner was minimal. While the property owners lost in *Keystone*, they lost because the *evidence* failed to show a Constitutional violation, *not* — as here — because the reviewing court decided *without evidence* that no such cause of action could even be pled.

Nor is there any attempt in the Court of Appeal's opinion to apply the "reasonable, investment-backed expectations" standard, although that standard was called to the Court of Appeal's attention by First Church, was applied by this Court to a facial attack in *Keystone* (480 US at 493 *et seq.*), and is discussed in many of the law review articles cited in the Court of Appeal's opinion (see App A, p 7, fn 7).

The Court of Appeal's defiant opinion ignores this Court's repeatedly expressed standards for determining whether a regulation takes private property.

4. THE COURT OF APPEAL MISCONSTRUED THIS COURT'S CASES BY CONCLUDING THAT ALL REASONABLE USE OF A PARCEL OF PROPERTY CAN CONSTITUTIONALLY BE PROHIBITED WITHOUT COMPENSATION

The Court of Appeal said it perceived a "public safety exception" in this Court's jurisprudence which would permit the County to preclude all reasonable use of First Church's property without compensation. (App A, p 8 *et seq.*)

Wrong.

The extent of the use prohibition approved by the Court of Appeal in this case goes beyond anything this Court has ever countenanced. To be sure, the law has always been that *an activity* which is a nuisance to neighbors has no right to exist. But concluding that *a particular activity* may be a nuisance, and that *that activity* may be prohibited, is far from saying that *all reasonable use* of an *entire property* may be sacrificed for the public good without compensating the owner. And no decision of this Court has ever gone that far.

The Court of Appeal's jumping off point for this holding was the following sentence in this Court's opinion in this case:

> "We accordingly have *no occasion to decide . . . whether* the county *might* avoid the conclusion that a compensable taking had occurred *by establishing* that the denial of all use was insulated as a part of the State's authority to enact safety regulations. [Citations.]" (482 US at 313, emphasis added.)

If this Court intended that statement to be read as broadly as the Court of Appeal interpreted it, then this Court could have directly established that immunity as a matter of law. This Court did not. This Court remanded for trial to determine whether the County could *prove* that the draconian restriction imposed on First Church and the need which supposedly supported the County's ordinance were sufficient to require *consideration* of such a rule. The passage in this Court's opinion begins, "[w]e accordingly have no occasion to decide . . ." For the Court of Appeal to draw an ironclad rule from this Court's refusal to consider an issue is a leap due process of law does not countenance.

Moreover, this Court's comment cannot be read in a vacuum. It is necessarily tied to the cases cited as authority for the proposition, which were obviously intended to illustrate the lack of breadth of the statement. Those cases plainly demonstrate the Court of Appeal's error in its *carte blanche* blessing of the County's action.

In *Mugler v. Kansas* (1887) 123 US 623, operation of a brewery was precluded. In *Hadachek v. Sebastian* (1915) 239 US 394, operation of a brick manufacturing facility in a residential area was precluded. In *Goldblatt v. Hempstead* (1962) 369 US 590, operation of a rock quarry was precluded. A clear picture emerges: in each case, it was a *specific use* which the Court held could be prevented because *that specific use* constituted a nuisance which was troublesome to others. In *none* of this Court's cases has the Court held that *all* reasonable use could be prevented without compensation.

A

The Court of Appeal's Error is Shown by it's Need to *Distinguish* an Opinion on Which This Court Expressly Relied in This Case

The Court of Appeal's opinion disregards this Court's analysis by distinguishing (rather than applying) one of the cases on which this Court based its 1987 decision.

The Court of Appeal relied heavily on the holding in *Mugler*. (App A, pp 10-13) In so doing, the Court of Appeal emphasized the fact that "[t]he *Mugler* court *distinguished Pumpelly v. Green Bay Company* 13 Wall. 166." (App A, p 11; emphasis added.)

The error in that analysis (and the consequent error in heavily relying on *Mugler* while disregarding *Pumpelly*) is that, in *this* case, this Court relied on the analysis in *Pumpelly*, employing that analysis in the way the Court of Appeal rejected. As this Court put it in *this* case:

> "It has also been established doctrine at least since Justice Holmes' opinion for the Court in *Pennsylvania Coal Co. v. Mahon* . . . that '[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.' [Citation.] While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings. *In Pumpelly v. Green Bay Co.* [citation], construing a provision of the Wisconsin Constitution identical to the Just Compensation Clause, this Court said:
>
> > " 'It would be a very curious and unsatisfactory result if . . . it shall be held that if the government refrains from the

> absolute conversion of real property to the uses of the public it can destroy its value entirely, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use.'
>
> "Later cases have unhesitatingly applied this principle. [Citations.]" (482 US at 316-317; initial emphasis added; final emphasis, the Court's.)

The Court of Appeal's analytical error is confirmed by its conclusion that "[e]recting a dam which permanently submerges a property owner's land under a lake [*i.e.*, the facts in *Pumpelly*] is one thing, a law limiting his use of that land quite another." (App A, p 12)

That Court of Appeal conclusion is utterly at odds with what this Court said in this case when it *applied Pumpelly*. Moreover, this Court's opinion in this case represents an adoption by the Court of the dissenting views of Justice Brennan in *San Diego Gas & Elec. Co. v. City of San Diego* (1981) 450 US 621.[14] As expressed there (450 US at 652):

> "Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. ***From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it.***" (Brennan, J, dissenting on behalf of 4 Justices;

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[14] That *First English* derives from Justice Brennan's *San Diego Gas* dissent is evident from *First English's* repeated citation of that dissent as authoritative. (482 US at 315, 316 fn 9, 318)

> additionally, Rehnquist, J, [the eventual author of *First English*] while concurring with the majority's procedural ruling, agreed with Justice Brennan's substantive analysis [450 US at 633]; emphasis added.)

The Court of Appeal's analysis is founded on a premise rejected by this Court. In refusing to apply *Pumpelly*, and — instead — applying its antithesis, the Court of Appeal feebly tried to rationalize its evasion of this Court's remand.

B

First Church Experiences No "Reciprocity of Advantage" in Being Prevented From Making Reasonable Use of its Property

This Court's explicit rationale for permitting the use of the police-power to preclude *noxious* uses is that *all* property owners — including the regulated owner — benefit from the restrictions placed upon each for the good of the community:

> "The Court's hesitance to find a taking when the state *merely restrains uses* of property that are tantamount to public nuisances is consistent with the notion of '*reciprocity of advantage*' that Justice Holmes referred to in Pennsylvania Coal. Under our system of government, one of the state's primary ways of preserving the public weal is *restricting the uses* individuals can make of their property. While each of us is *burdened somewhat* by such restrictions, we, in turn, *benefit greatly* from the restrictions that are placed on others."[15]

That analysis by this Court demonstrates that a regulation cannot Constitionally prevent all, or substantially all, use of

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[15] *Keystone*, 480 US at 491. (Emphasis added.) Please note that the Court is talking in terms of *restricting* uses, not *preventing all* economically viable use.

property. The owner of property who is prevented from making *any* reasonable use of his land cannot obtain any "reciprocity of advantage," or "benefit greatly" — or benefit at all — by "mutual" restrictions placed on others, as a totally restricted owner is precluded by nonuse from receiving any benefit. This "reciprocity of advantage" theory — which is the central justification for substantial use preclusion — can operate *only* in the context of all owners being permitted to make some reasonable, economically viable, use of their land.

The Court of Appeal recognized the necessity for there to be a "reciprocity of advantage" to justify restricting the use of First Church's property. But — again without any evidence to support it — the Court of Appeal *assumed* that First Church *received* some reciprocal "advantage" based on the Court of Appeal's further assumption that building campfires and pitching tents gave First Church reasonable use of its property. (App A, pp 24-25)

The concept of "reciprocity of advantage" can be difficult to understand and apply in routine zoning situations. However, to the extent that it has any force, its application is limited to those situations in which *all* property owners are permitted to make economically viable use of their land, even though it may not be the most profitable use. (*See, e.g., Penn Central*, in which the owner of New York's Grand Central Station was precluded from building a large office building over the terminal but was allowed to make a profitable use. Penn Central benefitted because the property's neighbors could not overbuild surrounding parcels. Likewise, in *Agins* [relied on at App A, p 15], the property was zoned to *permit* from 1 to 5 homes, which is all the property owners wanted. Similar restrictions on their neighbors would provide some "reciprocal" benefit by preserving the luxury character of the neighborhood.)

Nothing in either this Court's holdings or their rationale supports the notion that an individual may be singled out to

be forced to "donate" — without compensation — all reasonable use of his property for the greater good of the community.

5. THE COURT OF APPEAL IGNORED THIS COURT'S HOLDING THAT PROPERTY OWNERS HAVE A *RIGHT* TO BUILD ON THEIR PROPERTY, SUBJECT ONLY TO REASONABLE REGULATION OF THEIR CONDUCT

A fundamental basis for the Court of Appeal's decision is the factual assertion that the ordinance did not prevent *use*, it "only" prevented *construction of buildings*. (App A, p 18)

How substantial is an impact of the preclusion of buildings on a conference and recreational site which takes hours to reach from the homes of First Church's members is a fact question for trial.

Equally important, the Court of Appeal's conclusion (*i.e.*, that the prevention of construction of buildings *cannot* be a taking *as a matter of law*) is erroneous.

This Court addressed this issue in *Nollan*. Whether local government may prevent building without compensation (on the theory that construction is a "privilege" or "benefit" bestowed by government [as California courts ruled before *Nollan*], rather than a right of the property owner) was dealt with directly:

> "But *the right to build on one's own property* . . . even though its exercise can be subjected to legitimate permitting requirements . . . cannot remotely be described as a 'governmental benefit.' " (483 US at 834, fn 2; emphasis added.)

The right to build is just that — a *right*. To take that right — as this ordinance does (App A, p 18) — requires compensation.

Although the Court of Appeal disagrees, this Court has plainly announced that the rules have changed. Citizens have a right to build on their land, subject only to reasonable regulation, not prohibition.

6. THE COURT OF APPEAL VIOLATED THIS COURT'S REQUIREMENT THAT GOVERNMENT REGULATIONS WHICH ABRIDGE THE RIGHTS OF PRIVATE PROPERTY OWNERS BE SUBJECTED TO HEIGHTENED SCRUTINY

The Court of Appeal examined the County's rationalizations for its regulation by a relaxed standard of review which this Court disapproved two years ago:

In *Nollan*, the Court announced the proper standard:

> "We view the Fifth Amendment's property clause to be more than a pleading requirement, and compliance with it to be *more than an exercise in cleverness and imagination*. As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a '*substantial* advanc[ing]' of a legitimate State interest. We are inclined to be *particularly careful* about the adjective where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is *heightened risk that the purpose is avoidance of the compensation requirement rather than the stated police power objective*." (483 US at 841; some emphasis added.)[16]

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16 As this Court elaborated:

> ". . . our opinions do *not* establish that these standards are *the same* as those applied to due process or equal protection claims. To the contrary, our verbal formula-

(continued)

Being "particularly careful" in examining the basis of a regulation, as *Nollan* requires, mandates that the courts give substantially less deference to the rationalizations put forth by the government than in pre-*Nollan* times. Regulations can no longer be judicially sustained merely because there is *some* rational basis for believing that the challenged action *might* be necessary. (483 US at 834-835, fn 3) Nor are they to be routinely approved because of some generalized presumption of validity. (See App A, p 25)

Professor Daniel Mandelker, who describes himself as a "police power hawk," and who favors the power of government to regulate, explained the matter clearly in the recent rewriting of his nationally recognized text:

> "*Nollan's most important holding is the heightened standard of judicial review* it adopted for determining whether a land use regulation substantially advances legitimate governmental interests. This heightened judicial review standard, if the Court meant it to apply to all taking cases, substantially strengthens judicial review of land use regulations under the taking clause." (Mandelker, *Land Use Law* [2d ed 1988] §2.23 at 45; emphasis added.)[17]

(ftn. continued)
tions in the takings field have generally been *quite different*. We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, [citation], *not* that 'the State "could rationally have decided" that the measure adopted might achieve the State's objective.' [Citation.]" (483 US at 834, fn 3; emphasis added; Court's emphasis deleted.)

[17] The same analysis of *Nollan* appears in Best, *The Supreme Court Becomes Serious About Takings Law: Nollan Sets New Rules For Exactions* (1987) 10 Zon. & Plan. L. Rep. 153, 156; Bosselman & Stroud (1987) *The Current Status of Development Exactions*, 14 Fla. Env't & Urb. Issues 8, 9; Lawrence, *Means, Motives, and Takings: The Nexus Test of Nollan v. California Coastal Commission* (1988) 12 Harv. Env. L. Rev. 231; Marsh & Rosenthal, 5 Cal.
(continued)

This Court's analysis in *Nollan* shows the accuracy of this conclusion. There, the government sought to rely on the minimal, rational basis standard of review used here by the Court of Appeal. But this Court disagreed. Instead, this Court subjected the government's rationales to strict scrutiny, concluding that one justification for the action was ". . . a made-up purpose of the regulation . . ." (483 US at 839, fn 6), while others were ". . . impossible to understand . . ." (483 US at 838)

This Court's *Nollan* analysis was recently applied by the New York Court of Appeals in *Seawall Associates v. City of New York* (1989) 74 NY 2d 92. There, the court was confronted with analyzing the Constitutionality of a city ordinance requiring the owners of low rent apartment/hotels to maintain their properties and rent all units. The ostensible purpose was to alleviate the severe problems of the homeless.

Applying the heightened scrutiny required by this Court in *Nollan*, the New York court found that the city's explanation for its ordinance, while superficially plausible, failed the *Nollan* test. Upon analysis, it was clear that compelling the owners of the regulated properties to perform this public service did not *substantially* advance a legitimate public purpose and *in fact* would have little impact on the homeless problem. The ordinance was struck down because of its failure to establish the nexus required by *Nollan* between the end sought to be accomplished and the means chosen by the city to do so.

(ftn. continued)
Real Prop. J. 1; Peterson, 39 Hast. L.J. at 338; Taub, *Exactions, Linkages, and Regulatory Takings: The Developer's Perspective* (1988) 20 The Urban Lawyer 515, 579-580; *Supreme Court, 1986 Term: Leading Cases* (1987) 101 Harv. L. Rev. 119, 247; Comment (1987) 21 Creighton L. Rev. 213, 232; Comment (1987) 17 Golden Gate U.L. Rev. 197, 255; Comment, 54 Brooklyn L. Rev. 991; Comment (1988) 39 Mercer L. Rev. 1033, 1053.

Here, the Court of Appeal violated *Nollan*'s standard of review and presents a striking conflict with the analysis of the New York Court of Appeals in *Seawall*.[18]

CONCLUSION

The California Court of Appeal has thumbed its nose at this Court's remand. It has misconstrued the remanding opinion and it has ignored and misapplied other controlling precedents of this Court. In the process, it has continued California's position as a judicial system which fails to provide property owners with the protection guaranteed by the Fifth Amendment, creating conflict, *inter alia*:

- with the Rhode Island Supreme Court on the question of compensation for flood control ordinances which preclude the use of private property, and
- with the New York Court of Appeals on the question of how to apply *Nollan*'s heightened scrutiny of ordinances which take the use of private property.

Fundamentally, even ignoring other legal errors committed by the Court of Appeal, the Court of Appeal purported to decide fact issues with *no* evidence, *no* trial, and *no* factual record, thus denying First Church due process of law.

This Court's guidance is sorely needed. As this Court is aware, cases involving regulatory takings of property continue to be litigated. The standards to be applied by lower state and federal courts require further definition for the

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[18] This assumes that review of the basis of the County's ordinance was even before the Court of Appeal. It was not. The only issue raised in the Superior Court by the County was the "irrelevance" of an inverse condemnation cause of action because of *Agins's* conclusion that there could be no compensatory remedy. (Clerk's Transcript 27, 45) No justification of the ordinance was ever proffered in the Superior Court proceedings.

benefit of all parties to the land use planning process and the judges who must evaluate its impacts. As the Supreme Court of Washington put it recently, after a tortured attempt to determine the appropriate standards from this Court's jurisprudence:

> "Despite these attempts [*i.e., First English, Nollan,* and *Keystone*], the definitive answers so necessary for state courts to make reasoned determinations concerning minimum federal due process requirements, remain unavailable. Our task is complicated further by the ambiguities contained in recent Supreme Court decisions and by the fact that despite a 3-month separation, recent cases do not cite each other. As Justice Stevens observed, '[e]ven the wisest lawyers would have to acknowledge great uncertainty about the scope of [federal regulatory] takings jurisprudence.' " (*Orion Corp. v. State* [1987] 109 Wash 2d 621, 653)[19]

Three of the California Supreme Court's Justices saw the problem, but that Court's need (mandated by the California Constitution) to review hundreds of death penalty cases *de novo* has effectively stalled the California Supreme Court's civil case review. (*See* Uelmen, *The Court Sits Down to a Full Plate*, ABA Journal [California Edition] CE-1 [Oct 1988].)

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[19] For other similar struggles, *see, e.g., Parranto Brothers, Inc. v. City of New Brighton* (Minn App 1988) 425 NW 2d 585; *Maryland Port Administration v. QC Corp.* (Md 1987) 529 A 2d 829; *Loveladies Harbor, Inc. v. U.S.* (Cl Ct 1988) 15 Cl Ct 381.

Bench, bar, and private citizens need this Court's guidance. First Church prays that Certiorari be granted.

Respectfully submitted,

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APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

COURT OF APPEAL
SECOND DIST.
FILED
MAY 26, 1989
Robert N. Wilson, Clerk

FIRST ENGLISH EVANGELICAL
LUTHERAN CHURCH OF GLENDALE,
a California corporation,
Plaintiff and Appellant,
v.
COUNTY OF LOS ANGELES,
CALIFORNIA, and LOS ANGELES
COUNTY FLOOD CONTROL DISTRICT,
Defendants and Respondents.

NO. B003702
(Super.Ct. No. C 273634)

APPEAL from a judgment of the Superior Court of Los Angeles County. Albert D. Matthews, Judge. Affirmed and remanded.

Fadem, Berger & Norton, and Michael M. Berger, for Plaintiff and Appellant.

De Witt W. Clinton, County Counsel of Los Angeles County, and Arnold K. Graham, Principal Deputy County Counsel, for Defendants and Respondents.

In this opinion we consider an issue on remand from the United States Supreme Court. The high court held a landowner is entitled to compensation — not merely injunctive relief — when a court finds there has been no unconstitutional regulatory taking. But the Supreme Court expressly reserved the question whether respondent's regulatory action in this case amounted to an unconstitutional taking. We decide appellant failed to state a cause of action for two independent and sufficient reasons: (1) The interim ordinance in question substantially advanced the preeminent state interest in public safety and did not deny appellant all use of its property. (2) The interim ordinance only imposed a reasonable moratorium for a reasonable period of time while the respondent conducted a study and determined what uses, if any, were compatible with public safety.

FACTS AND PROCEEDINGS BELOW

This is an action for property damage caused by the flooding of plaintiff's 21-acre private campground, Lutherglen, located at the bottom of a canyon in the Angeles National Forest, at 23200 Angeles Forest Highway, Palmdale, California.

Plaintiff, First English Lutheran Evangelical Church of Glendale (First English) purchased Lutherglen in 1957. Twelve acres are flat land, elevated a little above the banks of Mill Creek, a natural watercourse running down the canyon through Lutherglen, and emptying approximately ten miles below into the Big Tujunga Dam. On this part of the property, First English built a dining hall, two bunkhouses, a caretaker's lodge, an outdoor chapel, and a footbridge across Mill Creek.

The Middle Fork of Mill Creek is the natural drainage channel for the watershed area (watershed area) owned by the National Forest Service (Forest Service) upstream of Lutherglen. The Middle Fork joins Mill Creek about 1-1/2

miles above Lutherglen, just below the point where the Angeles Forest Highway (highway) crosses the Middle Fork at Mileage Marker 16.56 (M.M. 16.56). The highway, built by defendant County of Los Angeles (County) with Forest Service approval, crosses the Middle Fork at about 20 locations in the canyon. At M.M. 16.56, the Middle Fork flows beneath the highway through two metal culverts placed by the County in the highway's solid raised dirt embankment.

About 3,860 acres of the watershed area were burned in a fire known as the Middle Fire in July 1977. It is undisputed that the Middle Fire created a potential flood hazard.[1]

On February 9 and 10, 1978, a disaster waiting to happen finally arrived. A storm dropped a total of 11 inches of water in the watershed area. A giant wall of water rushed toward the fragile structures people had erected on the banks of the creek. The docile, often dry creek became a raging river and overflowed the banks of the Middle Fork and Mill Creek. The highway's culverts at M.M. 16.56 were inadequate to handle the volume of water.[2] The flood drowned

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[1] The vegetation of a watershed area normally protects against flooding because the vegetation slows the flow of water, which can then percolate into the soil or be carried away by streams. When the vegetation is burned, however, there is no slowing of the flow, and the crust on the ground formed by the fire's intense heat prevents percolation of water into the soil. Additionally, the ash and debris from the fire increase the bulk of the flow, known as the bulking factor, which increases the erosion damage caused by the runoff.

[2] Mill Creek at Lutherglen had a capacity of about 6,000 cubic feet of water per second (cfs). During the storm, the peak runoff just below Lutherglen was 8,800 cfs, 6,100 cfs of which came from Middle Fork and 2,700 cfs of which came from Mill Creek. Normally, had the watershed area not been burned, the flow from Mill Creek would have exceeded the flow from Middle Fork. Approximately 380,000 cubic yards of debris and sediment were carried by the runoff from the watershed area. About 12,000 cubic yards were deposited behind the highway at M.M. 16.56, about 38,000

(continued)

ten people in its path, swept away bridges and buildings, and inflicted millions of dollars in losses. Fortuitously, Lutherglen's planned camp for handicapped children scheduled for that week had been postponed. So no lives were lost on its property when the surging waters engulfed Lutherglen and destroyed its buildings.

Plaintiff filed this inverse condemnation action against the County and the Los Angeles County Flood Control District (District), claiming that the damage to Lutherglen constituted a taking without payment of compensation contrary to article I, section 19 of the California Constitution.[3] The first cause of action alleges that (1) the defendants are liable under Government Code section 835[4] for controlling the Middle Fork and the highway at M.M. 16.56, which constituted a dangerous condition of public property; and (2) that a County ordinance adopted after the flood constituted an unconstitutional taking of property by prohibiting all use of Lutherglen's 21 acres. The second cause of action alleges that the District engaged in cloud seeding during the storm, for which it is liable in tort and inverse condemnation.

The trial court granted the following pretrial motions: (1) defendants' motion to strike the portion of the first cause of action for damages in inverse condemnation based on the taking of all use of Lutherglen by a County ordinance; (2) the District's motion for judgment on the pleadings on the second cause of action in tort and inverse condemnation based on cloud seeding; and (3) defendants' motion to limit

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(ftn. continued)
cubic yards were deposited in Lutherglen, and the rest was deposited at Hansen Dam.

[3] All references concerning the complaint refer to the Second Amended Complaint for Inverse Condemnation filed on January 5, 1981.

[4] Hereafter all section references are to the Government Code unless otherwise indicated.

the trial to the first cause of action for damages under section 835, rather than in inverse condemnation.

The trial, which proceeded solely on the section 835 action, was bifurcated and liability was tried to a jury prior to damages. At the close of plaintiff's evidence on liability, the court granted defendants' motion for nonsuit. A judgment of nonsuit dismissing the entire complaint was entered. In its initial appeal to this court, First English appealed the judgment of dismissal and also sought appellate review of the pretrial rulings enumerated above, and of the post-judgment order awarding costs and fees to defendants.

In an unpublished opinion authored by Justice Thompson, this court affirmed the nonsuit of the section 835 cause of action but reversed the dismissal of the claim of inverse condemnation based on the County's cloud seeding efforts. As to the "regulatory taking" cause of action based on the interim County ordinance prohibiting First English from rebuilding the destroyed buildings, Justice Thompson wrote: "We conclude that because the United States Supreme Court has not yet ruled on the question of whether a state may constitutionally limit the remedy for a taking to nonmonetary relief, this court is obligated to follow *Agins*. (*Auto Equity Sales, Inc. v. Superior Court* (1982) 57 Cal.2d 450, 455.)" (*First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, et al.* (No. B003702), unpublished slip opinion, at p. 22.)[5]

The California Supreme Court adhering to its own precedent in *Agins v. Tiburon* denied review on the "regulatory taking" as well as all other issues raised in the initial appeal. But the United States Supreme Court seized upon the case to

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[5] In *Agins v. Tiburon* (1979) 24 Cal.3d 266, affd. on other grounds (1980) 447 U.S. 255, the California Supreme Court held a property owner was not entitled to monetary damages unless and until a court ruled a land use regulation was excessive and the government nevertheless chose to continue it in effect.

finally resolve the remedy issue, a question it had been unable to reach for procedural reasons in a series of prior appeals.[6] The Supreme Court limited its grant of certiorari to our ruling on the "regulatory taking" cause of action. In a 6-3 decision the high court reversed our resolution of this issue. The majority held we were in error because we relied on an erroneous ruling of the California Supreme Court in *Agins*. The Supreme Court held monetary damages indeed can be sought as an initial remedy for "inverse condemnation" claims based on unconstitutional "regulatory takings." (*First Lutheran Church v. Los Angeles County, supra*, 482 U.S. at p. 321.) However, the Court limited its decision to this single issue and remanded the case to our court to determine whether the County's ordinance actually represents an unconstitutional "taking" of appellant's property without compensation. (*Id.* at pp. 313, 321, 322.)

DISCUSSION

Our own previous opinion and that of the Supreme Court define what it is we have yet to resolve in the instant opinion. The trial court made its order striking the inverse condemnation conversion allegation based on the California Supreme Court ruling that damages are not available for a "regulatory taking" until after the regulation in fact is ruled to be an unconstitutional taking and the government elects to continue the regulation in effect. This grounds for the order has been overturned. We must now decide whether this order

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[6] "Four times this decade, we have considered similar claims and have found ourselves for one reason or another unable to consider the merits of the *Agins* rule. See *MacDonald, Sommer & Frates v. Yolo County* (1986) 477 U.S. 340; *Williamson County Regional Planning Comm. v. Hamilton Bank* (1985) 473 U.S. 172; *San Diego Gas & Electric Co [v. San Diego* (1981) 450 U.S. 621]; *Agins v. Tiburon, supra.*" (*First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304, 310 [96 L.Ed.2d 250, 107 S. Ct. 2378].)

can be sustained on any other grounds. For, it is well settled that a trial court's decision is not to be reversed merely because it was based on erroneous grounds if there is an alternative rationale which will support that judgment. (*Keenan v. Dean* (1955) 134 Cal.App.2d 189 [appellate court can uphold motion to strike granted on erroneous grounds if demurrer could have been sustained for failure to state cause of action].)

The United States Supreme Court in *First English* made it abundantly clear the Court was deciding the remedies issue — and only that issue.[7] The majority specifically held it

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[7] First English and another land use case decided the same term — *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, 97 L.Ed.2d 677 — have engendered enormous interest in the academic community. (See, e.g., Horder, *Where Is The Supreme Court Heading in Its Taking Analysis and What Impact Will This Direction Have on Municipalities?* (1988) 28 Natural Resources J. 585. Geraci and Nabozny-Younger, *Damages for a Temporary Regulatory Taking: First English Evangelical Lutheran Church v. County of Los Angeles* (1988) 24 Cal. Western L.Rev. 33. Williams, *Legal Discourse, Social Vision and the Supreme Court's Land Use Planning Law: The Genealogy of the Lochnerian Recurrence in First English Church and Nollan* (1988) 59 Univ. of Colo. L.Rev. 427. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning* (1988) 20 Urban Law 735. Large, *The Supreme Court and the Takings Clause: The Search for a Better Rule* (1987) 18 Environmental L. 3. Falik and Shimko, *The "Takings" Nexus — The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California* (1988) 39 Hastings L.J. 359. Siemon and Larsen, *The Taking Issue Trilogy: The Beginning of the End?* (1988) 33 Wash. Univ. J. of Urban & Contemporary L. 169. Acton, *Much Ado about Nollan: The Supreme Court Addresses the Complex Network of Property Rights, Land Use Regulations, and Just Compensation in the Keystone, Nollan, and First English Cases* (1988) 17 Stetson L.Rev. 727. Woodard, *Constitutional Law: Is Time Running Out for the Government to Dispute Regulatory Takings?* (Spr. 1988) 10 Campbell L.Rev. 275. Patton, *Affirmative Relief for Temporary*

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was not deciding appellant had stated a cause of action. As Chief Justice Rehnquist wrote: "In affirming the decision to strike this allegation, the Court of Appeal [this court] assumed that the complaint sought 'damages for the uncompensated *taking* of all use of Lutherglen by County Ordinance No. 11,855.' . . . It relied on the California Supreme Court's *Agins* decision for the conclusion that 'the remedy for a *taking* [is limited] to nonmonetary relief . . . .' . . . . The disposition of the case on these grounds isolates the remedial question for our consideration. The rejection of appellant's allegations did not rest on the view that they were false . . . . Nor did the court rely on the theory that regulatory measures such as ordinance No 11,855 may never constitute a taking in the constitutional sense. Instead, the claims were deemed irrelevant solely because of the California Supreme Court's decision in *Agins* that damages are unavailable to redress a 'temporary' regulatory taking . . . .

"We reject appellee's suggestions that, regardless of the state court's treatment of the question, we must independently evaluate the adequacy of the complaint and resolve the takings claim on the merits before we can reach the remedial question . . . . We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part

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(ftn. continued)
Regulatory Takings (Summ. 1987) 48 U. of Pittsburgh L.Rev. 1215. Johnson, *Compensation of Landowners for Temporary Regulatory Takings* (Summ. 1987) 21 Ga.L.Rev. 1169. Lodise, *Retroactive Compensation and the Illusion of Economic Efficiency: An Analysis of the First English Decision* (1988) 35 UCLA L.Rev. 1267. Falik & Shimko, *The Takings Nexus: The Supreme Court Forges a New Direction in Land-Use Jurisprudence* (Spr. 1988) 23 Real Property, Probate & Trust J. 1. Batchelder, *Flood Plain Zoning in California — Open Space by Another Name: Policy and Practicality* (Feb. 1973, Vol. 10, No. 2) San Diego L.Rev. 381.)

of the State's authority to enact safety regulations. (Citations omitted.) *These questions, of course, remain open for decision* on the remand we direct today." (Italics added.) (*First Lutheran Church v. Los Angeles County, supra*, U.S. 482, 311, 313.)

The very limited nature of the Court's holding was underscored in a portion of the dissenting opinion which was not controverted in any way in the majority opinion. As Justice Stephens wrote in his dissenting opinion for three members of the Court: "The Court of Appeal affirmed on the authority of *Agins* alone, . . . without holding that the complaint had alleged a violation of either the California Constitution or the Federal Constitution. At most, it assumed, *arguendo*, that a constitutional violation had been alleged.

"This Court clearly has the authority to decide this case by ruling that the complaint did not allege a taking under the Federal Constitution, and therefore to avoid the novel constitutional issue that it addresses. Even though I believe the Court's lack of self-restraint is imprudent, it is imperative to stress that the Court does not hold that appellant is entitled to compensation as a result of the flood protection regulation that the County enacted. No matter whether the regulation is treated as one that deprives appellant of its property on a permanent or temporary basis, this Court's precedents demonstrate that the type of regulatory program at issue here cannot constitute a taking.

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"[A]lthough the Court uses the allegations of this complaint as a springboard for its discussion of a discrete legal issue, it does not, and could not under our precedents, hold that the allegations sufficiently alleged a taking or that the county's effort to preserve life and property could ever constitute a taking. As far as the United States Constitution is concerned, the claim that the ordinance was a taking of Lutherglen should be summarily rejected on its merits."

(*First Lutheran Church v. Los Angeles County, supra*, U.S. 482, at pp. 324-325, 328, Stevens, J., dissent.)

This brings us to the question whether the substantive allegations of the "regulatory taking" claim state a valid cause of action. The answer to this question, in turn, depends upon whether the public is justified in placing the burden of these restrictions on this private landowner rather than compensating the landowner for the uses it is required to give up. Commentators have noted the law is not well-settled in this area. (See, e.g., Siemon and Larson, *The Taking Issue Trilogy: The Beginning of the End?, supra*, 33 Wash. Univ. J. of Urban & Contemporary L. 169.) Nevertheless, there are enough guideposts to resolve the instant case. It simply does not pose a close issue under any formulation the Supreme Court has suggested as the appropriate test for judging when compensation is required.

I. THE "PUBLIC SAFETY EXCEPTION" AND OTHER GOVERNMENTAL RESTRICTIONS ON THE USE OF PRIVATE PROPERTY

Earlier we quoted Chief Justice Rehnquist's majority opinion in *First English* where he raised the possibility "the denial of all use was insulated [from compensation] as a part of the State's authority to enact safety regulations." One of the cases the Chief Justice mentioned in support of that proposition was the seminal decision, *Mugler v. Kans*as (1887) 123 U.S. 623. In that case, an owner of a brewery challenged a newly enacted state liquor prohibition law on grounds it constituted a taking of his property rights without compensation because it denied him use of his property. The Supreme Court in an opinion by Justice Harlan held this was not a compensable taking but rather a proper exercise of the state government's "police powers." "Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known

as the police powers of the State, and to determine, primarily what measures are appropriate, are needful for the protection of the public morals, the public health or the public safety.

"Undoubtedly the State, when providing by legislation for the protection of the public health, the public morals, or the public safety is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument or interfere with the execution of the powers confided to the government. (Citations omitted.) Upon this ground . . . defendants . . . [contend] that, as their respective breweries were erected when it was lawful to engage in the manufacture of beer for every purpose; as such establishment will become of no value as property, or, at least, will be materially diminished in value, if not employed in the manufacture of beer for every purpose; their prohibition upon their being so employed is, in effect, a taking of property for public use without compensation, and depriving the citizen of his property without due process of law.

"This interpretation of the 14th Amendment is inadmissible. It cannot be supposed that the states intended, by adopting that Amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community . . . [A]ll property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. (Citations omitted.)" (123 U.S. at pp. 660-665.)

The *Mugler* court distinguished *Pumpelly v. Green Bay Company* 13 Wall. 166. In that case the Supreme Court had held the state was required to compensate a property owner whose land was completely flooded when the government erected a dam across a river. "[*Pumpelly*] was a case in 'which there was a permanent flooding of private property,' a 'physical invasion of the real estate of the private owner and a practical ouster of his possession.' His property was, in effect, required to be devoted to the use of the public, and,

consequently, he was entitled to compensation." (123 U.S. at p. 668.)

Erecting a dam which permanently submerges a property owner's land under a lake is one thing, a law limiting his use of that land quite another. As the *Mugler* court ruled: "A prohibition simply upon the use of property for purposes that are declared by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by anyone, for certain forbidden purposes, is prejudicial to the public interest. Nor can legislation of that character come within the 14th Amendment, . . . unless it is apparent that its real object is not to protect the community, or to promote the general well being, but, under the guise of police regulation to deprive the owner of his liberty and property, without due process of law. *The power which the states prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not — and, consistently with the existence and safety of organized society, cannot be — burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain by reason of their not being permitted . . . to inflict injury upon the community.*" (123 U.S. at pp. 668-669, italics added.)

We recognize a brewery is a far cry from a Bible camp. But here the threat to public health and safety emanates not from what is produced on the property but from the presence of any substantial structures on that property. The principles enunciated in *Mugler* have been applied by the Court to uphold prohibitions against a broad range of other uses of one's property — e.g., an ordinance prohibiting the manufacture of bricks inside the city limits of Los Angeles

(*Hadacheck v. Sebastian* (1915) 239 U.S. 394); a requirement property owners cut down red cedars which were infected with a communicable plant disease fatal to neighboring apple orchards. (*Miller v. Schoene* (1928) 276 U.S. 272); and a prohibition against excavating below the water table in order to extract gravel (*Goldblatt v. Town of Hemstead* (1962) 369 U.S. 590).

Sometimes government exercises its police powers through the enactment of zoning ordinances and other forms of land use regulation. Whether a specific regulation represents an unconstitutional "taking" involves the same considerations as suggested in *Mugler* and its progeny.

Recently, in *Agins v. Tiberon* (1980) 447 U.S. 255, Justice Powell writing for a unanimous court gathered the strands of earlier cases[8] and articulated the test which the high court now invokes in zoning cases. "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests (citation omitted) or denies an owner economically

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[8] The first Supreme Court case to address the constitutionality of municipal zoning itself was *Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365 which upheld the validity of this form of land use regulation by analogy to the government's power to regulate public nuisances on private property. It is noteworthy this case was written in the heyday of "substantive due process" when the Supreme Court freely struck down many other regulatory laws. Indeed *Euclid v. Ambler* was authored by one of the chief exponents of "substantive due process", Justice Sutherland. The next few years saw a number of cases accepting the constitutionality of land use regulation (*Zahn v. Board of Public Works* (1927) 274 U.S. 325; *Gorieb v. Fox* (1927) 274 U.S. 603) although two opinions of that era disapproved specific provisions not remotely resembling the instant ordinance and its public safety concerns (*Nectow v. City of Cambridge* (1928) 277 U.S. 183; *Washington ex rel. Seattle Title Trust Co. v. Roberge* (1928) 278 U.S. 116).

viable use of his land (citation omitted).[9] The determination that governmental action constitutes a taking is, in

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[9] The essence of this test was set forth in 1922 when the court denied relief to a homeowner whose house was threatened with damage because of a coal mining operation beneath his property. (*Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393.) The majority opinion by Justice Holmes held a newly enacted "subsidence" law amounted to an unconstitutional taking of the mineowners' entire "surface support" property interest, an interest the landowners above had sold them previously. Although Justice Holmes did not use the precise words the court subsequently set forth as a test in *Agins*, a later opinion pointed out he was talking about the same factors — the public interest the regulation advances and the degree of the taking. (*Keystone Bituminous Coal Assn. v. De Benedictis* (1987) 480 U.S. 470, 485 [94 L.Ed.2d 472].) Notably, as the Supreme Court pointed out in that same opinion, Justice Holmes did not contest the main legal premise of Justice Brandeis' dissent — government has an absolute right to prohibit land uses which constitute a public nuisance. Instead Justice Holmes attacked the minor premise. (480 U.S. at p. 488, fn. 17, citing 260 U.S. at pp. 413-414, 417.) He found the particular statute involved was not a legitimate exercise of the police power but only a "private benefit" statute which shifted economic benefits from individual mineowners to individual building owners. "A source of damage to such a house is not a public nuisance .... Further, *[the statute] is not justified as a protection of personal safety.* That could be provided for by notice." (260 U.S. at pp. 413-414, italics added.) Justice Holmes then shifted to the other factor and found "the extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land — a very valuable estate — and what is ... a contract ... binding on the [homeowner]." (*Ibid.*)

In *Keystone Bituminous Coal* the Supreme Court distinguished Justice Holmes majority opinion in *Pennsylvania Coal* and upheld a similar "subsidence" statute by emphasizing the Legislature enacted the new law to advance the "health, safety and general welfare" of the public instead of "merely ... balancing ... the private economic interests of coal companies against the private interests of the surface owners." (*Keystone Bituminous Coal Assn. v. De Benedictis, supra*, 480 U.S. at pp. 485-492.) The court also looked to the second factor of the *Agins* test and found that in any event the

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essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when property has been taken (citation omitted) the question necessarily requires a weighing of private and public interest. . . . Appellants [in the *Agins* case] . . . will share with other owners the benefit and burdens of the city's exercise of its police power. Assessing the fairness of the zoning ordinances, these benefits must be considered along with any diminution in market value that appellants may suffer." (447 U.S. at pp. 260-262.)

In *Agins*, the Supreme Court was called upon to apply this test to a zoning ordinance which limited landowners to one residence on each acre of land. The court found the prevention of premature urbanization was a "legitimate state interest" and a limitation of one dwelling per acre "substantially advanced" this interest. It further found the landowner shared in these public benefits which helped offset any diminution of market value he might suffer. Accordingly, the regulation imposing the limitation was not an unconstitutional "taking" of the landowner's property and the landowner was not entitled to compensation.

In a case decided the same term as *First English* the Supreme Court applied this same basic test to strike down a condition the California Coastal Commission imposed on a owner of beachfront property (*Nollan v. California Coastal Commission, supra*, 483 U.S. 825). This condition required the owner to grant an easement allowing public access to the

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"subsidence" statute did not represent a taking of "all use" since the mineowners could still take out substantial amounts of coal without disturbing the surface.

For reasons discussed in the next section, the instant case resembles *Keystone Bituminous Coal* much more than it does *Pennsylvania Coal*. However, here the public safety concerns are far more dominant than they are even in *Keystone Bituminous Coal*.

beach in front of his home. The Supreme Court added a refinement to the test. The government's regulation — in this case, a condition — must substantially advance the precise state interest which avowedly motivated the regulation. The *Nollan* majority found the condition imposed — an easement affording *physical* access to the beach — did not substantially advance the avowed purpose of enhancing *visual* access to the beach.

II. FIRST ENGLISH IS NOT ENTITLED TO COMPENSATION BECAUSE THE INTERIM ORDINANCE DID NOT DEPRIVE IT OF "ALL USES" OF LUTHERGLEN AND WHATEVER USES WERE DENIED WERE PROPERLY DENIED TO PRESERVE PUBLIC SAFETY

One pair of commentators suggests the Supreme Court has held a private landowner is entitled to compensation when a land use regulation *either* does not substantially advance a legitimate public purpose *or* deprives the landowner of "all uses" of the property. (Falik and Shimko, *The Takings Nexus: The Supreme Court Forges a New Direction in Land-Use Jurisprudence, supra*, 23 Real Property, Probate & Trust J. 1.) To put it another way, they construe the Supreme Court's decision in *Agins v. City of Berkeley, supra*, to mean landowners are entitled to compensation if the land use regulation deprives them of "all uses" of the property even if the regulation involved substantially advances a legitimate public purpose. They admit there is conflict between this "either/or" test and some of the crucial language in Justice Rehnquist's majority opinion in *First English*. There, as will be recalled, the Supreme Court majority clearly stated the land use regulation involved in this case — Interim Ordinance 11,855 — would *not* constitute a compensable "taking" if the regulation did not deprive First English of "all use" of its property *or* even assuming it prohibited "all uses"

if that deprivation of "all uses" promoted public safety. Under this formulation First English would not be entitled to compensation even if Interim Ordinance 11,855 deprived it of "all uses" of Lutherglen if that prohibition substantially advances the interest in public health and safety.

If necessary, we could readily reconcile the *Agins* formulation and the *First English* formulation. In *Agins* the public purpose advanced was the interest in preventing premature urbanization (with premature urbanization defined as development in excess of one home per acre). The Supreme Court might have difficulty finding that this public purpose would justify depriving a landowner of "*all* use" of his property. However, the Supreme Court recognized the public purpose in *First English* is far different — the preservation of lives and health. It would not be remarkable at all to allow government to deny a private owner "all uses" of his property where there is no use of that property which does not threaten lives and health. So it makes perfect sense to deny compensation for the denial of "all uses" where health and safety are at stake but require compensation for the denial of "all uses" where the land use regulation advances lesser public purposes. Indeed it would be extraordinary to construe the Constitution to require a government to compensate private landowners because it denied them "the right" to use property which cannot be used without risking injury and death.[10]

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[10] This reconciliation of the two formulations finds considerable support in another opinion filed during the same term as *First English — Keystone Bituminous Coal Assoc. v. De Benedictis, supra*, 480 U.S. 470. "Many cases . . . have recognized that the nature of the State's action is critical in takings analysis. (Fn. omitted.).... The Court's hesitance to find a taking when the state merely restrains uses of property that are tantamount to public nuisances is consistent with the notion of 'reciprocity of advantage' that Justice Holmes referred to in *Pennsylvania Coal*.... [O]ne of the State's primary ways of preserving the public weal is restricting

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We need not choose between the *Agins* and *First English* formulations of the test, however. Interim Ordinance 11,855 survives under either formulation. It did not deny First English "all use" of the property and the uses it did deny could be constitutionally prohibited under the County's power to protect public safety.

True, the complaint *alleges* Interim Ordinance 11,855 denies First English "all use" of Lutherglen. But as will be seen shortly, the ordinance *does not* deny First English "all use" of this property. It does not even prevent occupancy and use of any structures which may have survived the flood. It only prohibits the reconstruction of structures which were demolished or damaged by the raging waters and the construction of new structures. In no sense does it prohibit uses of this campground property which can be carried out without the reconstruction of demolished buildings or the erection of new ones. *As far as this ordinance is concerned*, many camping activities could continue on this property. Meals could be cooked, games played, lessons given, tents pitched. (If Lutherglen had been a factory or a coal mine, these sorts of uses would have meant little to the landowner. But Lutherglen is a camping facility. So uses of value to that purpose remained available during the time the interim ordinance was in effect.)

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the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others. . . . [T]he Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it. . . . As the cases . . . demonstrate, the public interest in preventing nuisances is a substantial one, which in many instances has not required compensation." (480 U.S. at pp. 488-489, 491, 492.) As we do in the instant case, however, the Supreme Court found it unnecessary to rest its decision solely on this grounds since the mineowners retained some uses of their property. (*Ibid.*)

Given the serious safety concerns demonstrated by the May 1978 flood, the County might well have been justified in prohibiting entirely any human occupancy or other use whatsoever of Lutherglen until it had completed a thorough study and determined precisely what, if any, occupancy and uses were compatible with the public safety. However, we need not address that issue in this case since Interim Ordinance 11,855 did *not* by its terms preclude "all uses" of this property.

The issue actually raised is whether the County could constitutionally do what it did in Interim Ordinance 11,855 — prevent the construction of any buildings in Lutherglen on an interim basis. It is to this issue we now turn.

To properly apply the constitutional test to respondents' regulatory action in this case requires that we take a closer look at the interim flood control ordinance itself as well as other relevant land use provisions. We are reviewing a judgment on the pleadings and ordinarily would be confined to the allegations of the complaint. However, an appellate court is allowed to take account of matters which can be judicially noticed (Code Civ. Proc., § 430.30(a); *Dryden v. Tri-Valley Growers* (1977) 65 Cal.App.3d 990, 997; 4 Witkin, Cal. Procedure, 3d ed. 1985) Pleading, §§ 394, 395; 5 Witkin, Cal. Procedure, *supra*, § 896.) This includes legislative acts and enactments (*People v. Oakland Water Front Co.* (1897) 118 Cal. 234, 245; *Livermore v. Beal* (1937) 18 Cal.App.2d 535; 4 Witkin, Cal. Procedure, *supra*, § 395). We have taken judicial notice of the disputed interim ordinance, County Ordinance No. 11,855, the subsequent permanent flood control ordinance, and a variety of other county ordinances bearing on this particular property.

First English's camp, Lutherglen, is located in an area which was and is zoned "R-R" (Resort and Recreation). A youth camp such as this is allowed within this zone only pursuant to a "Conditional Use Permit." At the time of the flood, the camp grounds included two bunk houses, a dining

hall, a caretaker's lodge, and an outdoor chapel. After the February 1978 flood swept away most of these structures and those of other camps in the Mill Creek flood way, the County adopted County Ordinance No. 11,855 as an interim measure. This ordinance was enacted on January 11, 1979, and provides in pertinent part:

"A person shall not construct, reconstruct, place or enlarge any building or structure, any portion of which is, or will be, located within the outer boundary lines of the interim flood protection area located in Mill Creek Canyon, vicinity of Hidden Springs,. . . .

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"Studies are now under way by the Department of Regional Planning in connection with the County Engineer and the Los Angeles County Flood Control District, to develop permanent flood protection areas for Mill Creek and other specific areas as part of a comprehensive flood plain management project. Mapping and evaluation of flood data has progressed to the point where an interim flood protection area in Mill Creek can be designated. Development is now occurring which will encroach within the limits of the permanent flood protection area *and which will be incompatible with the anticipated uses to be permitted within the permanent flood protection area.* If this ordinance does not take immediate effect, said uses will be established prior to the contemplated ordinance amendment, and once established may continue after such amendment has been made [because of the "grandfather" provisions of the zoning code]." (Emphasis in original.)

By its terms, this ordinance temporarily prohibited appellant from rebuilding the structures lost to the February 1978 flood while the County studied what permanent measures it would have to take to prevent a recurrence of that deadly event. The interim ordinance did not affect eight of the twenty-one acres on the Lutherglen site because they were not in the flat land near the river channel.

Appellant's "regulatory taking" cause of action was predicated solely on this temporary interim ordinance. Nor has First English ever amended its complaint to allege the permanent flood control ordinance enacted in 1981 constituted a "taking" of its property. Nonetheless, it is helpful to an understanding of the temporary measure to consider the terms of the permanent ordinance.

On November 8, 1980 — 22 months after the interim ordinance went into effect and 21 months after First English filed its lawsuit — the Los Angeles County Regional Planning Commission issued a report on a proposed permanent Flood Protection District encompassing the Mill Creek area. The commission found: ". . . [T]he subject property [restriction] represents one strategy in Los Angeles County's comprehensive program *to insure compliance with the requirements of the Federal Flood Protection Program by designation of a flood protection area along the stream bed of Mill Creek*; . . . [T]his will be accomplished by the prohibition of buildings and major structures within the area reserved for flood flows which includes both the existing wash or channel and additional area as may be necessary to provide reasonable protection from overflow of flood waters, bank erosion, and debris deposition; . . . *[A]ll affected parcels still will have buildable areas*; . . . Establishment of the proposed district at such location is in the interest of public health, safety, and general welfare. . . ." (The Regional Planning Commission, County of Los Angeles, Flood Protection Case No. 3-(5) November 8, 1980, italics added.)

Pursuant to the commission's findings and recommendations the Board of Supervisors enacted Ordinance No. 12,413. This ordinance, adopted August 11, 1981, created the Mill Creek Flood Protection District and superseded the interim flood protection district of Ordinance No. 11,855. The permanent building restriction encompasses the same area as the interim ordinance had. This permanent ordinance recites as its purpose: "The flood protection district is

established as a supplemental district for regulation of property within areas designated by the Chief Engineer of the Los Angeles County Flood Control district as subject to substantial flood hazard. Such district includes both the existing wash or channel and additional area as necessary to provide reasonable protection from overflow of floodwaters, bank erosion, and debris deposition."

Among other things, the permanent ordinance prohibits construction or reconstruction of most buildings within the district. The exceptions, however, do permit "accessory building structures that will not substantially impede the flow of water, including sewer, gas, electrical, and water systems approved by the county engineer . . . [a]utomobile parking facilities incidental to a lawfully established use . . . [and] [f]lood control structures. . . ." (§ 22.44.220.) Another provision instructs the county engineer to "enforce, as a minimum, the current Federal flood plan management regulations" when considering whether to issue building permits for buildings or other structures in this flood control zone.

If there is a hierarchy of interests the police power serves — and both logic and prior cases suggest there is — then the preservation of life must rank at the top. Zoning restrictions seldom serve public interests so far up on the scale. More often these laws guard against things like "premature urbanization" (*Agins v. Tiburon, supra*, 447 U.S. 255), or "preserve open spaces" [*Morse v. County of San Luis Obispo* (1967) 247 Cal.App.2d 600), or contribute to orderly development and the mitigation of environmental impacts (see, e.g., *Euclid v. Ambler Realty Co., supra*, 272 U.S. 365; *Friends of Westwood v. City of Los Angeles* (1987) 191 Cal.App.3d 259). When land use regulations seek to advance what are deemed lesser interests such as aesthetic values of the community they frequently are outweighed by constitutional property rights (see, e.g., *Desert Outdoor Advertising v. County of San Bernardino* (1967) 255 Cal.App.2d 765).

Nonetheless, it should be noted even these lesser public interests have been deemed sufficient to justify zoning which diminishes — without compensation — the value of individual properties. (Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, (1971) 44 So.Cal.L.Rev. 1, and cases cited therein.)

The zoning regulation challenged in the instant case involves this highest of public interests — the prevention of death and injury. Its enactment was prompted by the loss of life in an earlier flood. And its avowed purpose is to prevent the loss of lives in future floods. Moreover, the lives it seeks to save and the injuries it strives to prevent are not only those on other properties but on appellant's property as well.

We need not address the ultimate question — is the public interest at stake in this case so paramount that it would justify a law which prohibited *any* future occupancy or use of appellant's land. Certainly, the owners of red cedar trees were not entitled to any public compensation when the state required them to destroy those trees in order to save the "lives" of apple trees in *Miller v. Schoene, supra*. But the zoning limitation in the instant case is nowhere near as Draconian. Zoning for this property allowed several uses of Lutherglen throughout the term of the interim ordinance First English challenges. During that period and after enactment of the permanent ordinance, as well, this property could be used for "agricultural, and recreational uses." And under the permanent ordinance First English appellants are specifically allowed to build swimming pools, parking lots, and accessory buildings within the flood zone portion of its property. (Since First English does not allege it has been denied permits to build any alleged "accessory buildings" we cannot know the scope of this exception.) What First English can no longer do is rebuild the bunkhouses and similar permanent living structures which might house the potential victims of a future flood or if carried away by that flood cause death,

injury and property damage to other properties further downstream.

We have no problem concluding these zoning restrictions represent a valid exercise of the police power and not an unconstitutional "taking without compensation." On balance, the public benefits this regulation confers far exceed the private costs it imposes on the individual property owner (especially after factoring in the public benefits this property owner shares). These are the considerations the Supreme Court deemed to control the decision whether government should be compelled to award compensation when its regulations drastically limit the uses of private property. (*Agins v. Tiburon, supra*, 447 U.S. 255, 260-262, see Discussion at pages 18-19, *supra*.) On one side of the scale the zoning restriction "substantially advances" the highest possible public interest — the prevention of death and injury both on and off appellant's property. On the other side of the scale, appellants and their future campers not only share in this public benefit but are still left with some permissible uses of the property. The fact the zoning restrictions necessary to the preservation of life and health may cause a diminution in the use and economic value of this property does not create a legal entitlement to compensation for that loss of use and value. (*Goldblatt v. Town of Hemstead, supra*, 369 U.S. 590; *Hadachek v. Sebastian, supra*, 239 U.S. 394; see *Keystone v. De Benedictis, supra*, 480 U.S. 470.)

This case presents a dramatic illustration of the principle of "reciprocity of advantage." Lutherglen is one of several properties running along this riverbed. Those who use Lutherglen are endangered by any structures that may be built on these other properties, just as those using the other properties are endangered by structures First English might erect on Lutherglen. First English enjoys the safety benefits accompanying the prohibition of construction on the other properties along the riverbed in return for the "reciprocal"

safety benefits that flow to the other landowners because First English is subject to a similar ban.

The instant complaint contains no allegations controverting the legislative history nor does it present other facts we are entitled to judicially notice casting doubt on the avowed intent and effect of the interim ordinance. Indeed, after reciting the terms of the now-superseded ordinance the sole allegation is that "Ordinance No. 11,855 denies First Church all use of Lutherglen." The complaint does not allege the limitations imposed on First English's use of the property were motivated by a desire to acquire Lutherglen at a lower price or that it was unreasonable for the County to conclude these limitations would contribute substantially to the public safety.

The government is entitled to a presumption its regulations are motivated by and reasonably serve their avowed purposes (*Morse v. San Luis Obispo County, supra*, 247 Cal.App.2d 600) which can only be overcome by specific allegations and proof. In the instant case, it is abundantly clear from the interim ordinance and related judicially noticed facts that the avowed purpose of this ordinance was to protect lives and health. There can be no serious contention under *Nollan* that the regulation fails to "substantially advance" the precise "legitimate state interest" the county avows prompted the interim and permanent ordinances. Restricting the erection of structures in the flood zone along the river is calculated to substantially advance the state's legitimate interest in preventing injury and death during the next flood. Accordingly, we are satisfied that the instant complaint does not state a valid claim for a compensable taking. In the words of Chief Justice Rehnquist, the ordinance did not "actually [deny] appellant all use of its property" and in any event "the denial of all use was insulated as a part of the State's authority to enact safety regulations." (*First Lutheran Church v. Los Angeles County, supra*, 482 U.S. at p. 313.)

III. THE INTERIM ORDINANCE IS FURTHER JUSTIFIED AS A REASONABLE TEMPORARY LIMITATION ON CONSTRUCTION TO MAINTAIN THE STATUS QUO WHILE THE COUNTY DETERMINED WHAT, IF ANY, STRUCTURES WERE COMPATIBLE WITH PUBLIC SAFETY.

As an independent and sufficient grounds for our decision, we further hold the interim ordinance did not constitute a "temporary unconstitutional taking" even were we to assume its restrictions were too broad if *permanently imposed* on First English. This interim ordinance was by design a temporary measure — in effect a total moratorium on any construction on First English's property — while the County conducted a study to determine what uses and what structures, if any, could be permitted on this property consistent with considerations of safety. We do not read the U.S. Supreme Court's decision in *First English* as converting moratoriums and other interim land use restrictions into unconstitutional "temporary takings" requiring compensation unless, perhaps, if these interim measures are unreasonable in purpose, duration or scope. On its face, Ordinance 11,855 is reasonable in all these dimensions.

The ordinance had the legitimate avowed purpose of preserving the status quo while the County studied the problem and devised a permanent ordinance which would allow only safe uses and the construction of safe structures in and near the river bed. The restrictions in Ordinance 11,855 were reasonably related to the achievement of this objective. Given the seriousness of the safety concerns raised by the presence of any structures on this property, we find it was entirely reasonable to ban the construction or reconstruction of any structures for the period necessary to conduct an extensive study and fully develop persuasive evidence about what, if any, structures and uses would be compatible with

the preservation of life and health of future occupants of this property and other properties in this geographic area.

We do not find the ordinance remained in effect for an unreasonable period of time beyond that which would be justified to conduct the necessary studies of this situation and devise a suitable permanent ordinance. The study was completed and a report containing recommended restrictions submitted in less than two years. County decision-makers took another six months to hold hearings, ponder and pass the somewhat less restrictive permanent ordinance. These periods are reasonable especially given the complexity of the issues to be studied and resolved. Nor were the restrictions imposed by the interim ordinance unreasonable in scope given the seriousness of the danger posed by the construction of new structures in Lutherglen and nearby properties. We cannot say that without a thorough-going study it would have been reasonably feasible to identify *any* structure which could be safely permitted on these properties. Thus we find the time taken by this study and the time this interim ordinance remained in effect to be well within the bounds of reason. The County owed this landowner no special duty to give priority to the study of Lutherglen over the study of other properties which might pose a danger to safety. Nor did it owe any of these landowners a duty to cut any corners in the study or take any risks that anything might be overlooked which could produce a permanent ordinance less restrictive than public safety concerns demanded.

IV. SINCE THERE WAS NO UNCONSTITUTIONAL "TAKING" OF LUTHERGLEN, FIRST ENGLISH HAS NOT STATED A CAUSE OF ACTION ENTITLING IT TO COMPENSATION

Since we hold the instant complaint is insufficient to state a cause of action that the limitations imposed by the interim ordinance represented an unconstitutional "taking" of First English's property it follows First English is not entitled to compensation for a "temporary taking" between the time the interim ordinance was enacted and it was superseded by the somewhat less restrictive permanent ordinance. The Supreme Court's majority opinion in *First English* held property owners are entitled to compensation for so-called "temporary takings," but only where the government regulation in question is ultimately ruled to have worked an unconstitutional taking. "Invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause. . . . We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." (*First Lutheran Church v. Los Angeles County, supra*, 482 U.S. at pp. 319, 321.) Here we find interim ordinance 11,855 did not "work a *taking* of all use" of appellant's property. Consequently, there is no "duty to provide compensation for the period during which [that ordinance] was effective."

DISPOSITION

The judgment dismissing the cause of action for inverse condemnation based on enactment of Ordinance 11,855 is affirmed for the reasons recited in this opinion. In all other respects the opinion this court filed on June 25, 1985, and in which remittitur issued on November 4, 1985, remains in full force and effect. Accordingly, the case is remanded for further proceedings consistent with that opinion as to the cause of action for inverse condemnation based on cloud seeding.

CERTIFIED FOR PUBLICATION

JOHNSON, J.

We concur:

LILLIE, P.J.

WOODS (FRED), J.

APPENDIX B

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

COURT OF APPEAL
SECOND DIST.
FILED
JUNE 23, 1989
Robert N. Wilson, Clerk

FIRST ENGLISH EVANGELICAL
LUTHERAN CHURCH OF GLENDALE,
a California corporation,
Plaintiff and Appellant,
v.
COUNTY OF LOS ANGELES,
CALIFORNIA, and LOS ANGELES
COUNTY FLOOD CONTROL DISTRICT,
Defendants and Respondents.

NO. B003702
(Super.Ct. No. C 273634)

ORDER MODIFYING OPINION
AND DENYING REHEARING

THE COURT:

It is ordered that the opinion filed herein on May 26, 1989, be modified in the following particulars:

1. On page 21, line 5 from the top of the page change the word "use" to "uses" and on line 6, after the words "all uses" insert "of that property" so the complete sentence now reads:

> "There, as will be recalled, the Supreme Court majority clearly stated the land use regulation involved in this case — Interim Ordinance 11,855 — would *not* constitute a compensable "taking" if the regulation did not deprive First English of "all uses" of its property *or* even assuming it prohibited "all uses" of that property if that deprivation of "all uses" promoted public safety."

2. On page 22, last sentence of footnote 10, delete the word "(*Ibid.*)."

3. On page 23, line 11 of the first full paragraph, insert "First English's complaint stated solely a facial challenge to the interim ordinance and *as far as this ordinance itself was*" before the word "*concerned*" so the sentence now reads:

> "First English's complaint stated solely a facial challenge to the interim ordinance and *as far as this ordinance itself was concerned*, many camping activities could continue on this property."

4. On page 31, line 10 from the bottom of the page substitute the words "an automatic" for the word "a" so the sentence now reads:

> "The fact the zoning restrictions necessary to the preservation of life and health may cause a diminution in the use and economic value of this property does not create an automatic legal entitlement to compensation for that loss of use and value".

Appellant's petition for rehearing is denied.

No change in judgment.

APPENDIX C

ORDER DENYING REVIEW AFTER JUDGMENT BY THE COURT OF APPEAL

Second Appellate District, Division Seven, No. B003702 — S010941

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
AUG 25, 1989
Robert Wandruff, Clerk

FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH GLENDALE,
Appellant
v.
COUNTY OF LOS ANGELES,
Respondent.

Appellant's petition for review DENIED.

Lucas, C.J., Panelli, J. and Kaufman, J., are of the opinion the petition should be granted.

LUCAS
Chief Justice

APPENDIX D

LOS ANGELES COUNTY ORDINANCE NO. 11,855.

An interim ordinance temporarily prohibiting the construction, reconstruction, placement or enlargement of any building or structure within any portion of the interim flood protection area delineated within Mill Creek, vicinity of Hidden Springs, declaring the urgency thereof and that this ordinance shall take immediate effect.

The Board of Supervisors of the County of Los Angeles does ordain as follows:

Section 1. A person shall not construct, reconstruct, place or enlarge any building or structure, any portion of which is, or will be, located within the outer boundary lines of the interim flood protection area located in Mill Creek Canyon, vicinity of Hidden Springs, as shown on Map No. 63 ML 52, attached hereto and incorporated herein by reference as though full set forth.

Section 2. Violation of this ordination is punishable by a fine of not more than five hundred dollars ($500) or imprisonment in the County Jail for a period of not more than six (6) months or by both such fine and imprisonment. Each day during any portion of which any violation of any provision of this ordinance is committed, continued or permitted, constitutes a separate offense.

Section 3. If any provision or clause of this ordinance or the application thereof to any persons or circumstances is held invalid, such invalidity shall not affect other provisions or application of the ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this ordinance are declared to be severable.

Section 4. Studies are now under way by the Department of Regional Planning in connection with the County Engineer and the Los Angeles County Flood Control District, to develop permanent flood protection areas for Mill Creek and other specific areas as part of a comprehensive flood plain

management project. Mapping and evaluation of flood data has progressed to the point where an interim flood protection area in Mill Creek can be designated. Development is now occurring which will encroach within the limits of the permanent flood protection area and which will be incompatible with the anticipated uses to be permitted within the permanent flood protection area. If this ordinance does not take immediate effect, said uses will be established prior to the contemplated ordinance amendment, and once established may continue after such amendment has been made because of the provisions of Article 9 of Chapter 5 of Ordinance No. 1494.

By reason of the foregoing facts this ordinance is urgently required for the immediate preservation of the public health and safety, and the same shall take effect immediately upon passage thereof.

LOS ANGELES COUNTY CODE §22.44.010.
SUPPLEMENTAL DISTRICTS DESIGNATED.

As used in this Title 22, "supplemental districts" means:

A. Equestrian districts;
B. Setback districts;
C. Flood protection districts;
D. Community standards districts.
(Ord. 1494 Ch. 9 Art. 1 § 901, 1927.)

LOS ANGELES COUNTY CODE §22.44.020.
USE RESTRICTIONS. A person shall not use any premises in any supplemental district except as hereinafter specifically permitted in this Title 22, and subject to all regulations and conditions enumerated in this title.
(Ord. 1494 Ch. 9 Art. 1 § 901.1, 1927.)

LOS ANGELES COUNTY CODE §22.44.220.
BUILDING RESTRICTIONS. A person shall not use, erect, construct, move onto or, notwithstanding Subsections B and C of Section 22.56.1510, alter, modify, enlarge or reconstruct any building or structure within the boundaries of a flood protection district except as provided herein:

A. Accessory buildings and structures that will not substantially impede the flow of water, including sewer, gas, electrical, and water systems, approved by the County Engineer pursuant to Section 308 of Ordinance 2225, the Building Code, set out at Title 26 of this code;

B. Automobile parking facilities incidental to a lawfully established use;

C. Flood-control structures approved by the Chief Engineer of the Los Angeles County Flood Control District. (Ord. 1494 Ch. 9 Art. 4 § 904.2, 1927.)

LOS ANGELES COUNTY CODE §22.44.230.
LISTS OF DISTRICTS. The following flood protection districts are added by reference, together with all maps and the provisions pertaining thereto:

District Number	District Name	Ordinance Of Adoption	Date of Adoption
	* * *		
3	Mill Creek	12413	8-11-81

(Ord. 12413 § 1, 1981)

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

First English Evangelical Lutheran Church
of Glendale, a California corporation,
Petitioner,
vs.
County of Los Angeles, California,
Respondent.

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

Donald A. Johnson, being first duly sworn, deposes and says: I am a citizen of the United States and a resident of or employed in the county aforesaid. I am over the age of 18 years and not a party to the said action. My business address is 3550 Wilshire Boulevard, Suite 916, Los Angeles, California 90010. On this date, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said action by placing three true copies thereof with first-class postage fully prepaid, in the United States post office mailbox at Los Angeles, California, in sealed envelopes addressed as follows:

DEWITT W. CLINTON
COUNTY COUNSEL
CHARLES J. MOORE
Prin. Deputy County Counsel
500 West Temple Street
Los Angeles, CA 90012

JACK R. WHITE, ESQ.
HILL, FARRER & BURRILL
445 South Figueroa Street
35 Floor, Union Bank Bldg.
Los Angeles, CA 90071

That affiant makes this service, for MICHAEL M. BERGER, Counsel of Record, of FADEM, BERGER & NORTON, Attorneys for Petitioner herein, and that to the best of my knowledge all the persons required to be served in said action have been served.

Donald A. Johnson

On November 21, 1989, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Donald A. Johnson, known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

Witness my hand and official seal.

OFFICIAL SEAL
Theodore Matsuo Wilden
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires NOV 30, 1990

Theodore Matsuo Wilden
Notary Public in and for
said county and state